RECENT AMERICAN DECISIONS.

Superior Court of Cincinnati.

ISAAC W. PARKER ET AL. *v.* STEPHEN W. SIEBERN, AUDITOR, AND OLIVER W. NIXON, TREASURER OF HAMILTON COUNTY.

JAMES A. FRAZIER ET AL. *v.* THE SAME.

Tax upon the Owners of Shares of National Banks.—There is no valid objection to a state tax upon the owners of shares of stock in national banks, in common with other property in the state. And in estimating the value of such shares for purposes of taxation under state laws, it is not requisite to deduct that portion of the capital or property of such banks which is invested in United States stocks. The tax in such cases is an assessment upon the person of the owner, with regard to property, and in no sense a tax upon the bank or its capital.

THE petitions in these cases were filed in the Superior Court of Cincinnati in December 1865, stating that plaintiffs on and before 10th April 1865 were an association for carrying on the business of banking, under an Act of Congress, approved June 3d 1864, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," and had complied with all the requisitions of said act, and were entitled to all benefits and privileges which it secured. That the first-named association, with a capital of $304,000 paid in, divided into five thousand shares, had invested, according to the provisions of said Act of Congress, $299,150 in bonds and securities of the United States, exempt from state taxation, and that its other personal property did not exceed $60,000.

That the other association with a capital of $1,000,000, divided into ten thousand shares, had invested, according to the provisions of said Act of Congress, in bonds and securities of the United States, exempt from state taxation, of its capital the sum of $600,000, and otherwise in the course of business the sum of $1,139,050, and that the residue of its personal property, which might be subject to taxation under state authority, did not exceed $300,000. That the auditor of Hamilton county had assessed each shareholder in said associations, upon the duplicate of said county for taxation, the amount of his shares at their par value, without reference to the property of the association, which they claim that the shares represent. That the treasurer of Hamilton county is about to collect the tax assessed on said shares, viz.,

2 29-100 per cent. on the amounts thereof. That neither the Act of the General Assembly of the State of Ohio, passed 5th April 1859, entitled "An act for the assessment and taxation of property in this state, and for levying taxes thereon, according to its true value in money," nor the act amendatory thereto, passed 8th April 1865, under which said assessments are made, nor any act of the General Assembly of Ohio, did or could give authority to make said assessments or collect the same.

They claim to be allowed an exemption upon their shares in proportion thereof, to the bonds and securities of the United States held by the associations, instead of said shares being taxed at their par value, irrespective of the bonds and securities of the United States held by the associations.

They claim that the shares of banks organized under the authority of the state of Ohio are not taxed or required to be listed for taxation, and that individuals engaged in the business of banking, other than issuing notes for circulation, and otherwise employing moneyed capital, in listing their property for taxation, claim and are allowed an exemption as to the bonds and securities of the United States held by them, and that, therefore, the assessment on their shares will operate as an assessment of taxes under state authority, at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state of Ohio.

They pray for an injunction against the county auditor and county treasurer to restrain them from assessing or collecting said taxes. To which petitions the defendants demurred.

The cases were, at the January Term 1866, reserved to the court in General Term, for the opinion of all the judges upon the questions arising upon the demurrer.

Aaron F. Perry and *William T. Gholson*, for plaintiffs.

Wm. T. Scarborough, *Joshua H. Bates*, and *George Hoadly*, for defendants.

The opinion of the court was delivered by

STORER, J.—The questions presented by the pleadings lie within a narrow compass. There need be no discussion of merely constitutional powers, for every point that would seem by possibility to be involved, has not only been settled by the highest judicial

authority, but whether applied to the General Government or individual states, must be a necessary incident of sovereignty. We may dismiss, therefore, any argument to sustain the right to impose a tax, as well as to forbid the imposition.

However there may be a disposition at the present day with some tribunals, to announce *ex cathedra* what has been so long and so willingly approved by the profession, as if the foundations of our organic law had not yet been profoundly explored, and in the effort to enlighten, pages of mere axioms are read from the bench, we cannot perceive that the conclusions to which MARSHALL arrived, more than forty years ago, are made clearer or more consistent with sound reason by any modern jurist. We are content to follow so pure and just a man *haud passibus æquis*.

Assuming, then, that all bonds and other securities issued by the General Government are not the subject of state taxation, our inquiry is reduced to a single point: Can the shares of individual banks be taxed?

The power to tax is given in express terms by the forty-first section of the act to provide a national currency; but the same power would exist if the provision referred to had not been embodied in the act.

In all discussions where the taxing power of the state has been questioned, we find no claim asserted that the shares of individuals in the United States Bank were protected, because the capital and the business of that institution could not be assessed for state purposes. Judge MARSHALL, in *McCullough* v. *The State of Maryland*, 4 Wheat. 436, in announcing the unanimous opinion of the court declaring the law of Maryland imposing a tax on the bank to be unconstitutional and void, says, "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with the other real property within the states, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."

And Mr. Pinckney, the leading counsel for the bank, in his closing argument, admitted, "That the stock in the bank belonging to citizens of Maryland still continued liable to state taxation, as a portion of the individual property in common with all the other property of the state. The establishment of the bank, so

far from withdrawing anything from state taxation, brings some thing into it which the state may tax."

An examination of the cases in which the Supreme Court of the United States has from time to time considered these questions, will furnish no authority against the position which was maintained in the Court of South Carolina in *Bulow and Others* v. *The City Council of Charleston*, 1 Nott & McCord 527, and in *Berry and Others* v. *The Tax Collectors*, 2 Bailey 634. No appeal seems to have been taken by the bank to the ruling which imposed a tax upon the shareholders; but, on the contrary, the action of the state authority was not only submitted to, but virtually sustained by the acquiescence of those immediately interested.

There can be no doubt, from the law organizing national banks, as well as from various decisions upon questions analogous to the present, that a tax may be levied upon the shares held by individual shareholders.

But how the tax shall be assessed, and in what manner collected, presents another subject for consideration.

It cannot be doubted that the tax upon banking institutions must be equal, so far as it respects the percentage levied. No distinction can be permitted, or favor shown, to the domestic over the foreign corporation. This we consider to be the true exposition of the second section of the twelfth article of the Constitution of Ohio, which declares "that laws shall be passed taxing by a uniform rate all moneys, credits, investments in bonds, bank stock, joint stock companies, or otherwise," and our Supreme Court, in *City of Zanesille* v. *Richards*, 5 Ohio St. 589, decided that this provision "requires a uniform rate per cent. to be levied upon all property according to its true value in money."

The tax must not only be uniform, but assessed alike upon the same property, whether owned by residents or non-residents.

It is admitted that the county auditor, in May last, having applied to the proper officers of the bank, obtained the names of the shareholders in these institutions, and the number of shares owned by each; that each share was assessed at its nominal value and placed on the grand levy for taxation.

This, it is claimed, was done under the fourth section of the amendatory law of April 6th 1865, which requires "all shares

of stock in any national bank located within the state, whether held or owned by residents or non-residents, should be listed for taxation, and taxed in the city or county in which the bank is located."

This would seem to be in harmony with the power already given by the forty-first section of the act establishing the national banks; indeed, it is in strict conformity, unless the assessment is invalid upon other grounds.

It is not pretended that the per centum of tax levied is greater than that paid by other moneyed institutions in the state; but it would seem rather, if any discrimination existed, it was largely in favor of national banks. Thus the state institutions are assessed upon their capital stock, undivided profits, and all other means not forming part of their capital; while the national banks are not taxed as such, but the shares of individuals only, irrespec tive of all profits earned, are assessed. No authority is assumed by the state to tax the capital of these institutions, as it is composed altogether of United States bonds, which are exempted by law.

It is said by counsel, if the shares in the state banks are not taxed, there is no propriety in taxing the shares in the national banks. This supposed incongruity is readily explained when we are assured the tax imposed on the stockholders of the latter institution is not equal to that which is borne by those who hold shares in the former, and, therefore, there is no inequality in the burden. The apparent difference is in the mode. Besides, it is not true that the assessment of this tax can only be made when similar property, by the same designation, is subjected to taxation held by individuals in state institutions. No such condition is required by the statute, and we cannot see that any sound reason exists to forbid the levy.

An ingenious, but as we apprehend, an erroneous view has been presented in the argument, which, if sustained, would virtually place the shares of stock and the capital within the protection of the law which withholds the latter from taxation. It assumes that the stock originally subscribed and the original interests of the shareholders are identical; that the value of the shares depends upon the full enjoyment of all the privileges attached to the national banks by their organization, and the power, therefore, to impose a burden upon the owner of shares

must necessarily affect the corporation itself, lessen the immunity it claims to possess, and thus indirectly assess the capital.

It is argued further that this right to tax, if admitted, would lead to oppression, as it will be discretionary with the state how far it shall extend, and if allowed would endanger if not destroy the franchise.

These objections cannot, we are satisfied, be sustained by the facts before us, nor can we fairly anticipate any ground of future difficulty. We are not to believe the legislature will act a dishonorable part in so important a matter, where the interests of the state are immediately involved, or disobey a provision of the constitution which prohibits the imagined wrong. This argument at best is "*ab inconvenienti*," and can only be resorted to when all others have failed. We must never presume power not delegated will be usurped; if it should be, the judiciary would at once restrain the assumption.

But the shares in these national institutions are not a part of the capital. A deposit is made with the treasury department in United States bonds, to the amount of the stock subscribed, and bills representing currency are issued to the bank. It is on this circulating medium thus received, as well as on their deposits, discounted notes and bills, that the profits of the shares accrue. It is then but the levy of a percentage upon the means which produce these profits that is claimed by the state.

If, however, they are freed from the general burden on the hypothesis urged by counsel, an individual has but to invest his whole estate, however large, in these institutions, while the government, which immediately protects his property, and allows him to vindicate his rights in her tribunals, can derive no benefit from his estate; in reality he will bear no part of the public burdens.

Nor do we think the objection that the shares are not assessed at their real value can be sustained, as the auditor has placed them upon the duplicate, at the sum they stand credited on the books of the bank, as prescribed by the 12th section of the act which gave these institutions their corporate existence. Such a construction of the statute would necessarily confer very extensive power, and lead to great uncertainty in the mode of taxation, besides furnishing a standard to determine values in these days of stock gambling, not by any fixed rate, but rather by the caprice of speculators.

It is not alleged that the shares are valued too high, and we presume it could not with any truth be so affirmed, nor are any data assumed by which a more accurate and impartial assessment could be made. True it is, several theories are suggested by which supposed injustice might be avoided, but we must view the questions before us in their practical applications; we ought not even to imagine wrong to exist until the facts proved in the case will necessarily lead to such a conclusion.

As taxation is an essential attribute of sovereignty, all property is liable to be assessed for public purposes. If any exception exists, the reservation from the general burden is jealously guarded. There can be no implication where the exception is required to be expressly made.

The proposition that the shares in these banks are so identified with their capital that they in reality represent it, has been fully considered in the case of *The City of Utica* v. *Churchill and others*, decided a short time since by the Supreme Court of New York, and which was affirmed on error by the Supreme Court of the United States at their late session, that we do not feel required to discuss the question anew. We fully accord with the opinion of the majority of the court in the latter case, and that of Judge SELDEN in the former.

In thus deciding, we are satisfied we do nothing to impair the authority of the General Government, or lessen, in the least degree, our solemn obligation as a judicial tribunal to uphold the law, while we sustain in its full integrity our national credit. Our first duty, we admit, is to preserve the Union, but we must not, in our devotion to the national unity, forget that it is composed of individual states.

The foregoing opinion of Mr. Justice STORER is upon a subject of very great interest to the several states, since exempting all the bank stock in the country from all state taxation, even as a source of income, in common with other sources of income, in addition to all National stocks, will reduce the range of state taxation, in many districts, within very narrow limits. It will extend scarcely beyond the land and goods and chattels in possession. This is, indeed, no reason why it should not be exempted, if the fair construction of the National Constitution requires it. But it affords good cause for careful consideration before taking a step so essentially limiting the range of state taxation.

The case, so far as any impediment to levying the tax arises from the conflict between National and state sovereignty, must turn upon the same

questions as that of *Bank of Commerce* v. *New York City*, 2 Black 620, and the case of *Bank Tax*, 2 Wallace U. S. 200. And the only earlier cases, in the Supreme Court of the United States, bearing directly upon the same question, are *McCullough* v. *State of Maryland*, 4 Wheat. 316, and *Weston* v. *The City Council of Charleston*, 2 Peters 449. The case of *Osborne* v. *The Bank of the United States*, 9 Wheat. 738, being regarded as almost identical with *McCullough* v. *State of Maryland*.

It is scarcely necessary to say that as the powers and functions of the National Government have become very much extended since those early decisions in regard to taxation were made, it is but natural, perhaps, that the constructions and decisions of the Supreme Court should have correspondingly changed.

At the time of the discussion of the case of *McCullough* v. *Maryland*, at the February Term 1819, after argument by the ablest counsel, perhaps, which the republic has ever produced, Mr. Webster, Mr. Wirt, and Mr. Pinckney, for the United States; and Mr. Hopkinson, Mr. Jones, and Mr. Martin, for the State of Maryland; and, after mature consideration by the court of last resort, embracing among its members many of the ablest and wisest judges who have ever adorned any judicial tribunal; men cotemporary with and sustaining the most intimate relations toward the framers of the National Constitution, and within comparatively a few years of its adoption; under these favoring accidents for obtaining thorough and correct views of its import and fair construction, no pretence was put forth, even by way of argument or illustration, verging in the remotest degree towards the exemption of the shareowners of the bank from liability to state taxation. But it was expressly conceded in the argument and assumed by the court, in giving their opinion and judgment, that this exemption did "*not extend to a tax paid by the real property of the bank, in common with other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state.*" The tax there held invalid was a stamp-tax imposed upon the issues of the bank, amounting to one per cent. upon its entire circulation, unless the bank should pay fifteen thousand dollars annually, in advance, to the treasurer of the state, as a bonus or royalty upon the privilege of exercising banking powers within the state. Chief Justice MARSHALL, in conclusion, puts the decision expressly and exclusively upon the ground that "this is a tax on the *operations* of the bank, and is, consequently, on the operation of an *instrument* employed by the Government of the Union to carry its powers into execution."

And in *Osborne* v. *The Bank of the United States*, 9 Wheat. 738, where the whole ground is again reviewed by the court, the question arose upon an assessment made directly upon *the bank*, and which the treasurer of the State of Ohio was proceeding to collect, by distress, upon the deposits in the bank, and the court declare that "the bank is not considered as a private corporation, whose principal object is trade and individual profit, but as a public corporation, created for public and national purposes." "The whole opinion of the court in the case of *McCullough* v. *The State of Maryland*," said the learned judge, "is founded on and sustained by the idea that the bank is an *instrument* which is necessary and proper for carrying into effect the powers vested in the Government of the United States." The entire argument of this distinguished luminary of American constitutional law, in this case and that

of *McCullough* v. *Maryland*, extending over more than fifty pages, upon all the questions involved, is made to turn exclusively upon the idea of the distinction between a *specific tax upon the bank itself and its operations* and a general one upon its property or shares in common with other similar property in the state; the former being susceptible of being so extended and enlarged, if its validity is maintained, as to annihilate the bank as one of the *indispensable instruments of the National Government.*

And this point is perhaps still more distinctly brought out in the discussions upon the case of *Weston* v. *The City Council of Charleston*, 2 Peters 449, both in the state court and the national tribunal of last resort. Judge HUGER, of the Constitutional Court of South Carolina, who, with two other judges, dissented from the decision of the state court maintaining the tax, in a very able opinion, maintains that the tax in that case is a tax *eo nomine*, and specifically upon the United States stocks. And the case is placed by Chief Justice MARSHALL and the majority of the national court upon the same ground; while the dissenting opinion of Mr. Justice THOMPSON, in that court, is put upon the ground that the tax in that case was really nothing more than a tax upon the *owner of the stock*, on account of the income derivable from it. This shows how well agreed the different members of the court at that time were upon the principles upon which the cases, up to that time, had proceeded. There was not, at that time, supposed to be any objection to a state tax upon income, because it was derived from a loan to the National Government, provided this income were taxed only in common with income from other sources. But the objection to a specific tax upon any of the instruments of the National Government was, in its very nature, susceptible of an indefinite increase at the will of the states, so as, in effect, to extinguish the action of that government, if allowed.

But now that the results of national development have shown the convenience of multiplying national governmental functions, the same court hold, that no citizen or state corporation, within any of the states, can be taxed for income derived from any of the instruments of the National Government, and especially from its public stocks. It seems to us that this principle, carried to its legitimate results, will render state taxation very unequal, and that it is not in any just sense required by the necessities of the National Government. The court in the case of *Bank of Commerce* v. *New York City*, 2 Black 620, where this principle is first established, seem to place the decision mainly upon the ground that it will be impracticable for the national courts to protect the instruments of the National Government from destructive taxation unless they go the whole length of declaring United States stock exempt from the jurisdiction of the states, as a source of taxation, either directly or indirectly; that if the owners of the stock are allowed to be taxed for the income derived from it, the same evil consequences, except in a less degree, will follow, as if the tax were imposed upon the stock itself. This conjectural result seems to us merely imaginary, and, like all arguments *ab inconvenienti*, more specious than sound.

There is no principle better established than that a state may tax its inhabitants for income derived from the stocks of foreign corporations, or the public stocks of other states or countries. And this power of taxation exists wholly independent of any jurisdiction over the corporations or the stock itself. It is a merely personal tax, like a poll-tax. There is no limit to the right of personal taxation. It may be made to depend upon a thousand incidents almost; upon occu-

pation, or age, or property: and, in the latter case, it is wholly unimportant whether the property, so far as personalty is concerned, is within the jurisdiction of the state or not. Personal property is a mere incident of the person. It has always seemed to us, therefore, that the state should not be restricted in imposing an income tax upon its inhabitants, so as not to embrace income derived from loans to the National Government, as well as from all other sources. It has always appeared to us that any such restriction was an entire departure from the first principles upon which the exemption from taxation of certain instruments of the National Government were based, and at the same time the adoption of a principle of exemption from taxation which, while it resulted from extreme over-caution on the one hand, evinced a kind of disregard to the consequent embarrassments produced upon the other hand, which exhibited a degree of one-sidedness in the action of the national tribunal of last resort in painful contrast with the cautious and delicate circumspection exhibited by the court in its earlier discriminations in favor of exclusive national sovereignty and of the consequent curtailment of the sovereignty of the states, which it is the more alarming to perceive just at a time when the harmonious action of the state and national governments is liable at any moment to be irretrievably disturbed. But we understand also, and rejoice to remember, that all this apprehension on our part may proceed from wrong bias or want of full comprehension of the difficulties and dangers lurking under the form of taxation by way of income. To us it seems very certain that no danger could come from that mode of state taxation, and that the denial of it will be more likely to produce a revolution in the very framework of the government, than any other principle yet sanctioned by that court. We have felt the more disappointment at the advance of that tribunal in that direction, from the entire confidence which we feel in its wisdom and purity, and from our extreme gratification at some of its other recent decisions, which evinced such an abiding firmness and far-seeing comprehension in the discovery and maintenance of the just principles of liberty and justice.

We have presented the foregoing views in order to justify the suggestion that as these national banking associations are allowed to be formed, as part of the scheme "to provide a national currency, and for the circulation and redemption thereof," as among the *agencies and instruments* "necessary and proper for carrying into effect the powers vested in the government of the United States" by the Constitution; and as, according to the argument of the court upon that point in *McCullough* v. *Maryland*, *supra*, they could only be justified upon that ground, we do not well comprehend why it may not be as consistent, to exempt the owners of shares in such banks from all state taxation, on the ground of income derived therefrom, as in the case of the former United States Bank, or of the public stocks of the nation. But for the decisions in the more recent cases in the Supreme Court, already alluded to, we should have supposed the decision in the principal case most unquestionable; and we still trust the Supreme Court will find some good way to distinguish this case from that of *Bank of Commerce* v. *New York City*, *supra*, which does not readily occur to us, short of ruling these national banks "unnecessary" for governmental purposes, and, by consequence, unconstitutional: or if they cannot find any good way of escape in this direction, that they may be induced to retrace their steps towards the old foundations.

I. F. R.

Supreme Court of Pennsylvania.

WILLIAM H. SEISS *v.* HENRY STORCH.

Where a party is called by the other side as a witness on the trial of a case the objection to his competency is removed for all purposes, and he may be called at a subsequent period in the same trial as a witness in his own behalf.

ERROR to Common Pleas of *Lehigh county.*

The opinion of the court was delivered by

READ, J.—The defendant called the plaintiff, and he was examined and cross-examined. The plaintiff's counsel then called the plaintiff as a witness on his own behalf; he was objected to, but was admitted to testify, and was examined and cross-examined, and this is assigned for error.

In England, when called as a witness by the defendants, he might, on cross-examination, have testified as to every and any fact material to the issue, but in Pennsylvania, according to the rule in *Ellmaker* v. *Buckley*, 16 S. & R. 72, a party cannot, before he has opened his case, introduce it to the jury by cross-examining the witness of the adverse party. Accordingly, in *Floyd* v. *Bovard*, 6 W. & S. 75, the plaintiff called as a witness a co-defendant, and examined him, and at a subsequent stage of the trial he was called and examined as a witness for the defendant. In this case the witness was both a party and directly interested. C. J. GIBSON said, p. 77, "The plaintiff himself had called him to prove a part of his case, the witness consenting to be sworn; and had not this been done, he certainly would have been incompetent to testify for his co-defendant; and why? because his interest raised a presumption unfavorable to his credibility, which would not have been rebutted. But did not the plaintiff rebut it when he produced him as a witness worthy of credit and had the benefit of his testimony?—or did he assert no more than that he was worthy of credit only when he testified against his own interest? The man who is honest enough to declare the whole truth when it makes against him, will be honest enough to declare no more than the truth in his own favor. It would give a party an unjust advantage to let him pick out particular parts of a witness's testimony and reject the rest. But the matter does not rest on principle alone, for it is a familiar rule that a party can-

not discredit his own witness or show his incompetency:" see also *Stockton & Stokes* v. *Demuth*, 7 Watts 41, per SERGEANT, J., and *Turner* v. *Waterson*, 4 Watts & S. 175, by the same learned judge, where the same doctrine is directly laid down.

In construing, therefore, the remedial Act of 27th March 1865, P. L. 38, we must apply this well-established principle, that if a party puts an incompetent witness on the stand by exercising any power which he possesses over him, he makes him an entirely competent witness in the cause, to be used as such by either party. The learned judge was entirely right, and

The judgment is affirmed.

Supreme Court of New Jersey.

RIPLEY v. NEW JERSEY RAILROAD COMPANY.

Where a railroad company has issued a commutation ticket, by which the purchaser is entitled to ride for less than the usual legal fare, and the ticket contains a contract that the commuter shall show it to the conductor when requested, the company is entitled to enforce such contract strictly, and the loss of the ticket will deprive the commuter of his right to a free passage on the cars.

ON demurrer to the declaration,

The opinion of the court was delivered by

VREDENBURGH, J.—The declaration states that the defendants, on the 6th of January, 1865, in consideration of $80 paid them, granted to the plaintiff the privilege of a free passage on their road from New Brunswick to New York, daily for one year, and at the same time gave him a commutation ticket showing such right, and also at the same time a receipt for the money, which receipt also provides that the ticket is to be shown to the conductor each trip whenever required, and that the privilege is to be forfeited upon any infringement of this rule, and that no duplicate ticket would be issued.

The declaration then further avers, that in October the plaintiff had his ticket *stolen* from him, and that the defendants, because he could not show his ticket, refused him the said privilege of a free pass; whereupon he brought this suit for damages. This is not a question of the reasonableness of the rules of the

company, or whether the plaintiff complied with such rules, or whether it was reasonable or lawful for the company to establish rules that their conductors should see and examine the tickets of the passengers; but simply whether it was lawful for the parties so to contract, and whether they did so contract.

It is not suggested that the parties might not lawfully make such a contract, and it is apparent upon the express terms of the instrument that they did so contract.

It is argued that the ticket being lost, the plaintiff should be permitted to prove its contents, as in the case of other lost instruments. But nobody objected to that, that is not the difficulty; the difficulty is, that upon proving the contents it appears that by the terms of the instrument the plaintiff has lost the privilege of a free pass.

The right to a free pass depended by the terms of his contract upon his showing the conductor his ticket, and this he could not do for he had lost it.

It has been argued that the plaintiff had paid his fare, and that he ought not to lose his right because he has lost the evidence of the payment. If there had been no special contract, or if the plaintiff had paid all the fare that the law allows the defendants to charge, that would have been another question. But he paid here a special fare under a special contract.

The defendants agreed that the plaintiff might travel for a fare which is not alleged to be the full fare the law allowed, and the defendants had a right to enforce such conditions as they saw fit, and they saw fit to prescribe, as a condition, that the plaintiff should show his ticket, and this he agreed to.

He thus became his own insurer that he would not lose his ticket. If he did not like that contract he should not have entered into it. But having entered into it, he is bound by it as much so as the company are to carry him if he does show his ticket.

We are not concerned with what may have been the reasons the company had for inserting this condition in the contract. It is enough for us that they have done so.

The demurrer is well taken.

Supreme Court of Indiana.

DEARDORFF AND OTHERS *v.* FORESMAN.

Principal and Surety.—If a surety signs and delivers to his principal an instrument perfect upon its face, with a condition that it shall not be delivered to the obligee, payee, or grantee, until some other persons who are agreed upon shall also execute the same, and the principal delivers the instrument without regard to the condition, and the obligee, payee, or grantee has no knowledge of the condition, the delivery will bind the surety.

Same.—Promissory Note.—A. executed his promissory note, payable to the order of B., and induced C. and D. to sign the note as sureties, and redeliver it to him, A., upon the promise that he would procure other persons, named by them, also to execute said note. In disregard of his promise, A. delivered the note to B. without procuring the additional sureties agreed upon.

Held, that the delivery to B. was absolute, and that the sureties were liable, without regard to the condition.

APPEAL from the *Tippecanoe* Common Pleas.

H. W. Chase and *J. A. Wilstach*, for appellants, cited *Pepper* v. *The State*, 22 Ind. 399; *Awde* v. *Dixon*, 6 Exch. 869; *Leaf* v. *Gibbs*, 4 C. & P. 466; *Johnson* v. *Baker*, 4 B. & A. 440; *The State* v. *Bodly*, 7 Blk. 355.

John Pettit, for appellee, cited *Millett* v. *Parker*, 2 Met. (Ky.) 608; 1 Bouv. Inst. 345; 2 Id. 396.

The opinion of the court was delivered by

RAY, J.—Action by the appellee, upon a promissory note, against Deeds, Deardorff & Lehman. Deeds suffered a default. The other defendants answered in two paragraphs. First, that at the date of the note in suit, Deeds, who was insolvent, applied to them to execute the note with him, as his sureties, to the plaintiff, which they refused to do; that he fraudulently represented to them that if they would sign the note, he could procure as co-sureties with them eleven other responsible men, who are named, and that he would not deliver the note to the plaintiff until such signatures were procured. That he failed to procure the names he had promised, but delivered the note to the plaintiff. The note was made payable to the order of the plaintiff. The second paragraph of the answer averred the same facts, and was sworn to. The court below sustained a demurrer to both paragraphs. This is here assigned as error.

The appellants insist that the ruling in the case of *Pepper* v. *The State*, 22 Ind. 399, requires that the decision of the court below in this case should be reversed. We will consider the case cited only so far as may be necessary to determine its effect upon the question now before us. That case holds that, in an action upon an official bond given to the state, the sureties may defend, either upon the ground that the names of persons appearing to be signed to such bond were forged, and that they executed the bond upon the faith that such signatures were genuine; or that they were induced to execute and deliver the bond to the principal obligor upon the condition, or upon the consideration, or upon the promise, that certain other persons would sign it. It is, however, expressly said by the judge who delivered the opinion, in overruling the petition for a rehearing, that "we do not say that the same rule that applies to bonds taken pursuant to a statute would apply in private transactions." We are not disposed to extend the effect of that decision to instruments negotiable either by statute or by the law merchant, unless required to do so upon authority or principle. And as the case cited is put rather upon authority than principle, we will consider how far the decisions require us to extend the ruling. Indeed, the opinion given upon overruling the petition for a rehearing rests, except so far as it is based upon the construction of the statute, which construction we are not called upon to review, upon the case of *Bibb* v. *Reid et al.*, 3 Ala. 88, which, it is stated in the opinion, "is directly in point, and, after much reflection, we are prepared to say is, in our judgment, good law." That case cites the law as stated thus, in Sheppard's Touchstone 59: "So it must be delivered to a stranger; for if I seal my deed and deliver it to the party himself, as an *escrow*, upon certain conditions, &c., in this case, let the form of words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and (in reference to the legal operation of the deed) he is not bound to perform the condition."

The opinion proceeds: "The rule as above stated in the Touchstone, has been recognised in the United States, in the cases cited from 5 Cranch 351, 8 Mass. 230, and 2 Sumner 487; *but it does not appear to obtain at this day in England*, as appears by the case of *Johnson et al.* v. *Baker*, 4 Barn. & Ald. 440, where a composition-deed was delivered by a surety who had signed the

deed, to a creditor, not to be operative unless all the other creditors executed it. It was held that the deed was delivered as an *escrow*, and that all the creditors not having executed it, the surety was not bound. To the same effect are the cases cited from 3 Wend. 380, 11 Verm. 448, 4 Cranch 219, 2 Harrington 396, 11 Peters 86." The court seem evidently to have misconceived the effect of the decision in the case of *Johnson et al.* v. *Baker*. The creditors were all parties to the deed of composition, and when the debtor alone had executed it, "the deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors." It does not very clearly appear that because an instrument, after being executed by one party, may be delivered to another party to be executed by him, and presented by him to others who are parties to the deed, for their execution, and still not become a deed till executed by all parties, that therefore a deed, perfect in form and execution, may be delivered by the grantor to the grantee as an *escrow*. Nor is the citation of the ruling in *Pawling et al.* v. *United States*, 4 Cranch, as conflicting with the later case of *Moss* v. *Riddle*, 5 Cranch, satisfactory, especially as the later case is in conflict with the doctrine asserted by the Alabama court. But we will examine that case more carefully in the course of this opinion, only remarking in passing, that whatever the case in 4 Cranch does decide, which we will endeavor to determine in the subsequent review of the case, it certainly does not hold that a delivery may be made by the obligor of the bond to the obligee, as an *escrow*. Nor does the case of *The United States* v. *Leffler*, 11 Peters, examined hereafter, establish any such doctrine. The case in 3 Wend. 380, was where a bond had been executed by nine persons as obligors, "and sent to New York *to be delivered* to the plaintiff, on certain terms and conditions, by which the obligors intended to be indemnified for having become bound for the payment of the money. *The plaintiffs refused to receive the bond* on the terms and conditions proposed. Subsequently, on the 29th of October 1824, five of the obligors, but not those sued in the action, without the knowledge or consent of the defendants in this action, having made a new and different arrangement with the plaintiffs, by which the security relied on by the defendants for their indemnity was yielded up, delivered the bond to the plaintiffs." It was held that the bond was not obligatory upon

the four who never entered into the new arrangement with the plaintiffs. The bond was dated September 21st 1824, and the plaintiffs had then notice of the terms upon which the delivery was authorized; they refused to receive it upon those terms, but, on the 29th October, made other terms with five of the parties to the bond. The plaintiffs knew the terms on which the delivery was authorized, and refused to accept upon those terms, and the case simply decides that where the extent of the agent's authority is known to the person who deals with him, the principal cannot be bound outside of that authority. The case is good law, but not specially relevant to the text.

The case cited from 11 Verm. was where the names of seven sureties appeared upon the face of the bond, and only two of the sureties ever executed the same. The instrument was plainly incomplete until executed by all those whose names appeared as parties.

The decision in *Herdman* v. *Bratten*, 2 Harrington, *supra*, was that the deed could not be delivered to the party as an *escrow*. This is an express denial of the doctrine it is cited to sustain. So also the case of *The State* v. *Crisman et al.*, 2 Ind. 126, decides that "a bond cannot be delivered as an *escrow* to the obligee."

In the case of *The Madison, &c., Plank Road Co.* v. *Stevens*, 10 Ind. 1, Mr. Justice PERKINS states the decision thus: "One co-obligor may, perhaps, deliver a bond to another co-obligor as an *escrow*, but an instrument cannot be so delivered to the obligee or payee, or the agent of either. Such delivery is in law absolute: Peters' U. S. Digest, tit. *Escrow; Foley* v. *Cowgill*, 5 Blackf. 18; *The State* v. *Chrisman*, 2 Ind. 126; *Wright* v. *The Shelby, &c., Company*, 16 B. Mon. 5; see 7 Ind. 600; 6 Id. 183; 9 Id. 25. And parol evidence cannot be given to vary the legal effect of such delivery, or the terms of the instrument delivered. This has been too often decided to require a citation of authorities to evidence it: *Hiatt et al.* v. *Simpson*, 8 Ind. 256."

The case of *Foley* v. *Cowgill* was for a failure to deliver hogs at a certain time and place, according to a written agreement. The defendant answered that the agreement mentioned "was delivered to the plaintiff as an *escrow*, setting out the contingency on which it was to become binding on the defendant, which, it is

averred, had never happened." The Court ruled that if the instrument "be delivered to the obligee on such contingency, the condition is a nullity, and the delivery absolute."

And yet, without attempting to overrule or question these cases in our own state, the court, in overruling the petition for a rehearing, rests the decision of the case of *Pepper* v. *The State*, *supra*, except so far as a construction is given to the statute, upon an Alabama case in direct conflict with these repeated rulings of our own court. If the doctrine upon which the Alabama case proceeds be the law, that a deed or other written instrument may be delivered to the grantee or obligee as an *escrow*, it of course follows that a surety may make such a delivery to his principal. But, in our opinion, such a position is not only without support, but is in conflict with all authority. In the case of *Worrall* v. *Munn*, 1 Seld. 229, the instrument, an agreement to execute a conveyance, was delivered conditionally to the agent of the party to whom the deed was afterward to be executed. The court declares that the law puts the question at rest; that the delivery to the agent was a delivery to his principal. "This was a delivery as an *escrow;* such a delivery can only be made to a stranger. It cannot be made to the party. If made to the party, no matter what may be the form of the words, the delivery is absolute:" *Ward* v. *Lewis*, 4 Pick. 518; *Fairbanks* v. *Metcalf*, 8 Mass. 230. Mr. Parsons says: "A note, as well as a deed, may be delivered as an *escrow*, and the law of *escrow* is substantially the same in both cases. * * A note cannot be delivered directly to the promissee, to be held by him as an *escrow*:" 1 Notes & Bills, 51; *Badcock* v. *Steadman*, 1 Root (Conn.) R. 87.

We will examine the cases cited in the original opinion in the case of *Pepper* v. *The State*, *supra*. *Pawling et al.* v. *The United States*, *supra*, was an action "upon an official bond given by Ballinger, as collector of the revenue, and signed and sealed by Pawling, Todd, Adair, and Kennedy, as his sureties, who pleaded that they delivered the same as an *escrow*, to one Joseph Ballinger, to be safely kept, &c., upon condition that if Simon Ingleman and William Patton, *named on the face of the bond*, should execute the same as co-sureties, then the bond should be delivered to James Morrison, supervisor, on behalf of the United States, as their deed, and not otherwise; and that the same never

was executed by Ingleman and Patton." Here the representative of the government had notice, on the face of the instrument, that the same was not complete, not having been executed by all the parties whose names appeared upon its face as co-obligors. To have held this delivery of the instrument obligatory upon the parties, when the writing itself proved the execution to be incomplete, would have been in contradiction of its express terms.

In *The United States* v. *Leffler*, 11 Peters, *supra*, the question under consideration is not discussed either by court or counsel, and the statement of facts does not disclose whether there had ever been any intentional delivery of the bond, or, if delivered, by whom such delivery was made; and the only question considered was as to the competency of witnesses to prove a conditional execution. Under what circumstances such a defence was admitted does not appear. If the names of other parties appeared on the face of the bond, such a defence would have been admissible under the ruling in *Pawling* v. *The United States*, *supra*. As no question was made by counsel, it was probably controlled by that decision. If it were otherwise, the validity of such a defence was not so clearly established upon authority, that we are authorized to suppose it would have passed unquestioned when presented in the Supreme Court of the United States for the first time.

The case cited from 3 Barr (Penn.) 308, was where a party, in executing a bond, expressly stipulated that it should not be delivered up until twelve names were obtained, and the persons who were procuring names to the bond, for the benefit of third parties, agreed that they would not deliver it until it was so executed. It was held that such bond was in their hands as an *escrow*, and until the condition was performed it could not be delivered. So in the case cited from 2 Leigh 157, where the deputy marshal procured a party to sign a forthcoming bond, taken upon execution, and agreed not to file the bond in court until other persons had signed it, it was held that he could not make a valid delivery until the condition was performed. And again, in 2 Johns. R. 248, it was held that a sheriff might deliver a deed to an attorney to be held as an *escrow*, and only delivered to his client on compliance with the condition. The case of *Sharp* v. *The United States*, 4 Watts 21, decided that a bond containing in its body two names as sureties, was not binding on one who

signed it, unless it was shown that he dispensed with the execution of it by the other. The case in 7 Pick. 91 ruled that "where a bond is signed and sealed, *but not delivered to the obligee*, and it is afterward put into the possession of the obligee by a person who has no authority to deliver it, the obligee cannot maintain an action on the instrument."

In the case cited from 7 Ohio 375, the court permitted the party receiving the deed to testify that he only received it for the purpose of enabling him to convey to a third party. That the purpose and consideration of the deed was to enable him, as agent of the grantor, to execute a conveyance to another. We are unable to find the case cited, or any case in 4 Johns. R. having even as remote relation to the subject under consideration as those we have commented upon. In 34 New Hamp. 460, the rule is stated that "if a deed is placed in the hands of a depositary, to be delivered to the grantee upon the death of the grantor, provided it is not previously recalled, but the grantor reserves the right and power of recall at any time, it is not a good delivery."

In 13 Pick. 75, the presumption arising from the fact of a deed having been registered is discussed.

The case cited from 1 Johnson's Cases decides that "where the grantor held the deed until the consideration should be paid, and died before payment, there was no delivery."

The remaining authorities cited in *Pepper* v. *The State*, *supra*, refer to the question of agency, the decision proceeding, so far as those authorities are relevant, upon the ground that the obligor in a bond is the agent of the obligee, and the obligee is therefore responsible for all his representations to his sureties. It is unnecessary for us to examine these authorities, as the appellant in this case does not assume the position that a person may, as principal, make a valid contract with himself as agent. As a quotation is made from a note by Judge REDFIELD, in the April No. 1863, of the American Law Register, p. 346, which rests upon the case of *Pawling* v. *The United States*, *supra*, we will cite the opinion of the same author in the May No. 1864, of the same magazine, p. 402: "It seems to us upon principle, that where there is nothing upon the face of the paper indicating that other co-sureties were expected to become parties to the instrument, and no fact is brought to the knowledge of the obligee, before he accepts the instrument, calculated to put him on his guard in

regard to that point, and which would naturally have led a prudent man, interested in the opposite direction, to have made inquiry before accepting the security, the fault cannot be said to rest, to any extent, upon the obligee. And, on the other hand, where the surety intrusts the bond to the principal obligor, in perfect form, with his own name attached as surety, and nothing upon the paper to indicate that any others are expected to sign the instrument in order to give it full validity against all the parties, *he makes such principal his agent to deliver the same to the obligee*, because such is the natural and ordinary course of conducting such transactions; and if the principal, under such circumstances, gives any assurances to the surety, in regard to procuring other co-sureties, or performing any other condition before he delivers the bond, and which he fails to perform, *the surety giving confidence to such assurances must stand the hazard of their performance, and cannot implicate the obligee in any responsibility in the matter, unless he is guilty of fraud or rashness in accepting the security.*"

In the note to the April number of the magazine referred to, some authorities are cited as sustaining the application of the doctrine laid down in *Pepper* v. *The State* to "promissory notes and other contracts not negotiable, or to negotiable contracts before negotiation." The case cited, *Lloyd* v. *Howard*, 1 Eng. Law & Eq. Rep. 227, was where "A., being the payee and holder of a bill of exchange, wrote his name upon it and gave it to B. for the purpose of getting it discounted. B. never paid A. any money in respect to the bill, *but kept it until it was overdue*, when he delivered it to C. without receiving any value for it. Held, that there was no indorsement by A. to B." The fact that C. received the bill when overdue, could give him no right to insist that the apparent indorsement by A. to B. should be treated as real. The decision in the case of *Palmer* v. *Richards*, Id. 529, was where "the drawer of a bill of exchange which had been accepted, wrote his name across the back of the bill, and delivered it to A. to get discounted, who, instead thereof, while the bill was running, deposited it with B. as security for money advanced to himself, without fraud on the part of B. Held, that this was a valid indorsement of the bill by the drawer to B." In the case of *Leaf* v. *Gibbs*, 4 Carr. & P. 466, the facts show that the plaintiff, who was the payee of the note, knew that when the

defendant signed as surety, the agreement was that his mother was also to sign the note with him, and that she afterwards refused, and the confidential clerk of the plaintiff stated to the agent of the defendant and his mother that the arrangement was, in consequence of such refusal, incomplete. The court held that the defendant was not liable unless he waived the execution of the note by his mother. Where the payee receives the instrument with full knowledge of its incomplete condition, in fact it would, it seems to us, be a fraud to permit him to take advantage of its apparently perfect condition. The decision in the case of *Awde* v. *Dixon*, 5 Law & Eq. 512, also cited, cannot be reconciled with the American decisions. Mr. Parsons refers to that case as in conflict with the settled law in this country: 1 Bills & Notes 111. The court, to sustain their ruling, declare it to be the law in England, that if one signs a negotiable instrument in blank, and delivers it, with authority to fill it up for £100, and it is filled up for £200 and negotiated, the maker will not be liable. Lord MANSFIELD did not thus state the law in *Russell* v. *Langstaffe*, 2 Doug. 514, and in this country such a doctrine is against all authority, and a decision resting upon it cannot be considered in our courts as affording any aid in the determination of legal questions: *Fullerton* v. *Sturges*, 4 Ohio State Rep. 529, 1 Parsons, *supra*, and authorities cited. The decision in *Awde* v. *Dixon* proceeds upon the ground that the writing of the greater sum in the instrument would constitute the crime of forgery, and ALDERSON, B., placed the decision in the case upon that ground. This is perhaps correct under the English statute, but the Supreme Court of Massachusetts, in *Putnam* v. *Sullivan*, 4 Mass. 45, held otherwise, on the ground that the instrument had been delivered upon a trust, intending that something should afterward be written, to which the name should apply as an indorsement.

Judge REDFIELD, however, seems to have regarded the English decision in the case of *Swan* v. *North British, &c., Co.*, 10 Jur. N. S. 102, as conflicting with the view expressed in the note we have quoted from. In that case, "where A. was induced by his broker to send him blank forms of transfer, which the broker filled up with numbers and descriptions of shares different from those of the company intended by A., being shares in the defendant's company, and by means of a duplicate key, which he had

procured to be made without the knowledge of A., obtained certificates from a box of A.'s *necessary* to perfect the transfers, and also forged the names of the attesting witnesses. Held, in an action against the company for damages, and for a *mandamus* to restore the plaintiff's name to the registry, that the acts of the plaintiff were not such as estopped him from showing that the deed of transfer was a forgery." In other words, that where the act of the plaintiff, in trusting the agent with the blank forms of transfer, did not enable the agent to commit a fraud upon a third party, but such fraud could only have been consummated by the addition of larceny and forgery, in such case the plaintiff was not estopped. We admit that we are unable to understand what decision a court could legitimately render in such a case having any relation to the question now under consideration.

There has also been a case decided by the Supreme Court of Tennessee, 5 Humphrey 133, which rests for support upon the cases we have already examined in 4 Cranch and 11 Peters's Reports, and in our opinion is not sustained by those authorities. Counsel have cited to us also the case of *The State* v. *Bodley*, 7 Blackf. 355. There were in that case no questions decided or discussed by the court involving any point now under consideration. Nor could such questions have been presented in that case, as the bond, when delivered, contained the name, in the body of the instrument, of the other party who was to execute it, and the clerk who was to receive the bond had actual notice of its imperfect execution, he being the witness called to prove the fact that the sureties signed on condition that the person whose name was with theirs in the body of the bond should also execute it.

Since the decision in the case of *Pepper* v. *The State*, the New York Court of Appeals has rendered a decision, holding that where a bond is executed by sureties, and delivered to one of their number to keep until also executed by another surety, that the instrument, until so executed, is held as an *escrow*: *The People* v. *Bostwick*, 32 N. Y. Rep. 445.

Blackstone defines a delivery as an *escrow*, to be a delivery "to a *third* person to hold till some conditions be performed on the part of the *grantee*." See also 4 Kent 454; 1 Coke 36 *a*.

In Greenleaf's Cruise on Real Property, book 4, p. 29, it is said "The delivery of a deed may be either *absolute*, that is, to the grantee himself, or to some person for him, or else *conditional*,

that is, to a *third* person, to keep it *till something is done by the grantee;* in which last case it is not delivered as a deed, but as an *escrow.*" The instrument is as perfect and complete in form when delivered as an *escrow* as though it were to be delivered absolutely. An instrument delivered as an *escrow* cannot be withdrawn, but remains in the hands of the holder, to be delivered over to the party for whose benefit it was executed, whenever he performs the conditions upon which the original delivery was made. But so long as the instrument remains in the hands of one of the parties it has no force whatever.

When a decision is based upon so total a disregard of the essentials constituting the delivery of an instrument as an *escrow*, it may be well to look closely to the authorities which are cited to sustain this line of ruling.

Those authorities are the ones we have already reviewed, with the additional one of *The State Bank* v. *Evans*, 3 Green (N. J.) 155, which was a case "where the defendant's name was on the bond as one of the sureties, and he proved that the bond was brought to him by one of his co-sureties, and that when he signed it he delivered it to his co-surety, and said to him, 'Now, this bond is not to be delivered up *until all the persons named in it* have signed it.'" The court held that the testimony was admissible, and that it overcame the presumption of any legal delivery arising from the mere fact of the obligee having possession of the bond. This is simply another case where the instrument disclosed upon its face that it had not been executed by all the parties. But while citing authorities which, as we have seen, do not sustain the position they are quoted to support, the case of *The People* v. *Bostwick* entirely overlooks a decision rendered a year earlier by the Supreme Court of Maine, in which it was held that "where a surety to a bond signs upon the assurance that the principal will procure two other persons, specified and known to such surety, to sign the bond before he delivers the same, which he fails to do, but this is wholly unknown to the obligee at the time he accepts the bond, such surety is bound to perform the obligation."

The case of *Carr et al.* v. *Moore*, 2 Ind. 602, was an action of "debt on a bond given to a school commissioner, signed by A., C., and P. As to P. the bond was a forgery. The bond was delivered to C., the principal, to be signed and sealed, and

it was re-delivered to the commissioner by A. and C., perfected. The commissioner was ignorant of the forgery, the name of P. having been placed upon the bond after its delivery to C. for the signatures. Held, that A. was liable on the bond." Mr. Justice PERKINS, who delivered the opinion, says: "Had Carr (the principal) induced Athon (the surety) by fraud to execute the bond, still the school commissioner, being ignorant of the fact, could not, we suppose, be affected by it." There was no proof, however, of such fraud, and the expression must therefore be taken, we suppose, rather as the judgment of the writer of the opinion, than as the ruling of the court. But it is certainly entitled to consideration and respect.

The case of *Millett* v. *Parker et al.*, 2 Met. (Ky.) 608, reviews the authorities very fully upon this question, and holds that "a conditional delivery to the principal, by a person who subscribes a paper as a surety, will not make such paper a mere *escrow*. The delivery of the paper, to constitute it an *escrow*, must be made to a third person, and not to a co-obligor; and this whether the instrument be assignable or not."

The case of *The State* v. *Chrisman et al.*, 2 Ind. 126, was an action of debt upon an administrator's bond. Nelson, one of the defendants, filed the following plea, verified by oath: "That the said supposed writing obligatory in the declaration mentioned, was signed by him upon condition that twelve or fifteen other good men signed it, which was not done; and that unless said number of persons did sign it, it was not to be considered his deed." A demurrer was sustained to the answer. The court say: "This plea admits the signature to the bond, and does not deny that the same was delivered to the obligee. When so signed and delivered it became absolute." Upon the face of the bond it appears that the name of Nelson was written next following that of the principal, and was followed by the names of six other sureties. The presumption in law is that the names were signed in the order in which they appear upon the instrument, and as the obligee was the state, and the delivery was the filing of the completed instrument with the clerk, no delivery could have been made by Nelson to the obligee, upon his signing it. So that the decision of the case results, that no delivery by any of his co-obligors could be made to the obligee of the instrument as an *escrow*, but the delivery by any of them rendered Nelson liable on the bond.

It was also held, in the case of *Taylor & Co* v. *Craig*, 2 J. J. Marshall 449, that a conditional delivery of a promissory note, by a surety in the note to his principal, did not make the instrument an *escrow*, but that the plaintiff had the right to hold the surety responsible without regard to the condition he had imposed upon the principal at the time of the delivery. *The Bank of the Commonwealth* v. *Curry*, 2 Dana 143, recognises this as the law. Again, in the case of *Smith* v. *Moberly*, 10 B. Mon. 266, in deciding a similar question, this language is used: "But a delivery of a writing of this character, under such circumstances, to the principal, does not have the effect of characterizing it as a mere *escrow;* but, on the contrary, the principal should be considered as the agent of the surety, and empowered by him to pass the writing to the person to whom it may be made payable, and his delivery as being sufficient to make it effectual, unless the payee had notice of the special terms upon which it was signed. The implied discretionary authority to use the note, arising out of its possession by the principal, uncontradicted by its terms, or anything apparent on its face, cannot be restricted by any agreement between the payors themselves of which the payee had no notice." The Supreme Court of Vermont have also "held that where a note payable to a bank was signed by a principal and one surety, with an agreement on the part of the principal with such surety, that he would procure another surety, which was not done, before he procured the note to be discounted, it will constitute no defence, unless the officers of the bank were cognisant of such agreement:" *Passumpsic Bank* v. *Goss*, 31 Vt. 315; *Dixon* v. *Dixon*, 3 Vt. 450.

It seems clear, on principle, that a surety cannot make a delivery of a bond to his principal as an *escrow*, upon condition that other names shall be procured before its delivery to the obligee. The very definition of an *escrow* involves the holding of the instrument, complete in form, signed and sealed, prepared for delivery to the obligee, by a third person, who acts as the agent of the obligors and obligee, and who is to make the delivery, not upon some act done by the obligors, but upon the performance of some condition by the obligee. There are but two parties to the instrument, and so long as it is held by the principal it cannot be said to be delivered for any purpose, for it remains still in the hands of the one party, who is only to be bound in any man-

ner upon its delivery to the other. And where there is no delivery of the instrument by the one party executing it, it cannot be said to be held as an *escrow*.

Can a delivery then be made to the principal, as the agent of his sureties, for any other purpose than an unconditional delivery to the obligee?

The interest of the principal is clearly to procure the acceptance of his bond by the obligee, at the earliest moment, and with the least number of sureties. Experience proves, and the law so regards it, that it is a hardship to procure bail, and the interest of the principal is to avoid this hardship. On the other hand, the interest of the sureties is as clear to avoid a delivery until their *pro rata* liability has been reduced by the execution of the bond by other co-sureties.

It is a well-established principle of law, that he who has an interest in the doing of a particular act cannot accept an agency in the same matter for others whose interests are adverse to his own. A person will not be permitted to assume an agency for others where the interests of his principal would be in direct conflict with his personal interests. In *Copeland* v. *Mercantile Ins. Co.*, 6 Pick. 198, MORTON, J., says: "It is a rule of law well settled, and founded in the clearest principles of justice and sound policy, that the agent of the seller cannot become the purchaser, or the agent of the purchaser." Judge STORY, in his work on Agency, § 211, says: "For the like reason (that is, for the same reason that forbids an agent of the seller himself to become the buyer), an agent of the seller cannot become an agent of the buyer in the same transaction." And again, § 9: "Yet we are to understand that they cannot, at the same time, take upon themselves incompatible duties and characters. * * A memorandum made and signed by a seller, at the request of the purchaser, will not bind." See 3 Parsons on Contracts, p. 11; Smith's Mercantile Law 149; *Wright* v. *Dannah*, 2 Camp. 203; *Farebrother* v. *Simmons*, 5 B. & A. 333; *Rayner* v. *Linthorne*, 2 C. & P. 124; *Cooper* v. *Smith*, 15 East. 103. In *The Utica Ins. Co.* v. *Toledo Ins. Co.*, 17 Barb. 132, it is said: "The general principle that a party cannot act for himself in the same transaction in which he undertakes to act for another is well settled, and the validity of a contract in which he acts, and to which he is a party as agent for a third person, and also in his own behalf,

does not depend upon the question whether he makes an advantage by the transaction. * * The character of agent for one party to a contract, and that of principal upon the other part, are incompatible:" *Ex parte Bennett*, 10 Ves. 381; *Florence* v. *Adams*, 2 Rob. 556; *Beal* v. *McKinnan*, 6 Louis. 407; *Bentley* v. *Columbia Ins. Co.*, 19 Barb. 595.

The law, indeed, makes the principal, for a special purpose, *i. e.*, the delivery of the instrument, the agent of his sureties Their delivery of the instrument to the principal, after placing their names upon it, authorizes the principal to make the delivery to the obligee, for such is the channel through which the paper would properly pass in reaching the obligee. And the delivery of the instrument to be by him at once transferred to the obligee, is a delivery entirely consistent with the interests and inclination of the principal, and for such a purpose the delivery is proper. The original contract is between the principal on the bond and the obligee. The compliance with the contract is the delivery of the bond by the principal obligor to the obligee, duly executed by himself and his sureties. The contract between the principal on the bond and his sureties is that they will enable him to comply with his original contract. For this purpose they sign and deliver to him the instrument, that in the fulfilment of his original contract he may deliver it to the obligee.

Now, is it not clear that as the general purpose of the delivery by the sureties to the principal is that he may make a delivery to the obligee, no conditions imposed upon such delivery will bind the obligee unless they are known to him? In the case of *Pickering* v. *Busk*, 15 East 38, Lord ELLENBOROUGH, C. J., states the law thus: "Strangers can only look to the acts of the parties, and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily, and in all cases, limited to his actual authority, the reality of which is afterward to be tried by the fact. *It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect to the subject-matter;* and there would be

no safety in mercantile transactions if he could not. If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction room, can it be supposed that he sent them thither merely for safe custody?" And where the surety signs and delivers the bond to the principal, from whom it would naturally pass to the obligee, are we to suppose that such delivery to the principal was merely for safe custody? The rule laid down in the case cited is, where the commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe. "BAYLEY, J.—If the servant of a horse-dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed." And is not the surety upon a bond, who delivers it to his principal in apparent proper condition to be delivered by him to the obligee, and with the general authority to make such delivery, but circumscribed by a condition, unknown to the obligee, bound by the delivery which the principal may make in disregard of the condition? The rule is stated by a learned author thus: "An agent's authority is that which is given by the declared terms of his appointment, notwithstanding secret instructions; or that with which he is clothed by the character in which he is held out to the world, although not within the words of his commission. Whatever is done under an authority thus manifested, is actually within the authority, and the principal is bound for that reason; for he is bound equally by the authority which he actually gives, and by that which, by his own acts, he appears to give. * * The appearance of the authority is one thing, and for that the principal is responsible:" 1 Pars. on Cont. 44. The surety places the instrument, perfect upon its face, in the hands of the proper person to pass it to the obligee, and the law justly holds that the apparent authority with which the surety has clothed him shall be regarded as the real authority, and as the condition imposed upon the delivery was unknown to the obligee, therefore the benefit of such condition shall not avail the surety.

Thus, in our opinion, should the rule be established upon principle; and, as it appears by the examination we have made, that the authorities relied upon to sustain a contrary rule are, in the main, irrelevant, and are in turn quoted to support the cited decisions which are really in point, we are inclined, after a review of all the cases, to regard the real weight of well-considered decisions as sustaining the rule which to us seems to rest also upon a correct principle.

So far as the decision of the case of *Pepper* v. *The State*, *supra*, rests upon the construction of the statute, and upon the fact of forgery, we are not called upon to review it.

The action of the court below upon the demurrer was correct.

The judgment in this case is affirmed, with one-eighth of 1 per cent. damages, and costs.

United States Provisional Court for the State of Louisiana.

UNION BANK OF LOUISIANA *v.* THE CITY OF NEW ORLEANS AND THE FIRST NANIONAL BANK OF NEW ORLEANS.

On the occupation of New Orleans and the neighboring parts of the state by the Federal forces, in April, 1862, the officers of the rebel state government fled from Baton Rouge, the capital, to other parts of the state still held by the rebels, claiming to carry the government with them. The auditor of the state carried with him the public bonds belonging to the banks, deposited with him, according to law, as security for their circulation. These securities were held by him without warrant of law, as against any one claiming through the Federal government.

Securities, so withheld within the lines of the enemy, are lost, within the meaning of the law authorizing a recovery on instruments lost, without producing them.

Money, whether principal or interest, coming due on such securities, is due to the actual legal owner of them, and not to the person who wrongfully holds them.

Coupons are negotiable evidences of debts for interest, and are, in substance, promissory notes, payable at a specified time. If taken by any person, after they are due, they are taken subject to all the equities which properly attach to them in the hands of the previous holder.

A recovery may be had by the owner for the interest due on bonds, without producing the original coupons, on its being shown that they are wrongfully withheld from him in the territory of an enemy, and are therefore inaccessible to him, and also that they were so held when they became due, so that no one, hereafter to appear, can have the rights to them of a *bonâ fide* holder, for value, without notice.

Securities so withheld by the rebel state auditor, their *locus* being shown, are not lost within the meaning of the article of the Civil Code of Louisiana requiring that securities lost shall be advertised before a recovery can be had on them.

THIS was a suit, commenced by the Union Bank of Louisiana, to recover the sum of $90,000, being the amount of interest due on five hundred bonds of the consolidated debt of the city of New Orleans, under the following circumstances:—

The said bonds, with the coupons attached, were deposited with the auditor of public accounts, at Baton Rouge, in 1854, by the plaintiff, to secure the redemption of the circulating notes of the plaintiff, issued in conformity with the free banking laws of 1853, of the state of Louisiana; to be transferred and returned by the auditor to plaintiff upon its application, accompanied by a delivery to him of cancelled circulating notes to an equal amount or *pro rata*. On the capture of New Orleans and that part of the state in 1862, the officers of the insurrectionary government fled to avoid falling within the Federal lines, first to Opelousas and then to Shreveport, continuing to exercise their official functions at the places of their flight; the auditor carried with him the bonds so deposited. Under a special pass from Gen. Banks, the plaintiff did, by an agent, deliver cancelled notes to the amount of $252,600 to the rebel auditor at Shreveport, and applied for the return of an equal amount of bonds with their coupons; the said auditor refused to deliver the same, and was prohibited by the rebel legislature from doing so. The plaintiff finding it impossible to obtain the coupons, then applied to the mayor of New Orleans, and to the First National Bank of New Orleans, the fiscal agent of the city, with which were deposited, as required by law, certain revenues of the city, dedicated exclusively to the payment of these bonds, to pay the interest due on them, without the production of the coupons, which was refused by them, and this suit was thereupon commenced.

On the trial all the above facts were either proved or admitted.

William H. Hunt, for plaintiff.

Christian Roselius and *Sullivan, Billings & Hughes*, for defendant, the city of New Orleans.

Miles Taylor, for defendant, the First National Bank of New Orleans.

The opinion of the court was delivered by

PEABODY, J.—The plaintiff was the owner of bonds of the city of New Orleans to the amount of $500,000. The bonds are not

yet due. The interest on them was payable semi-annually in July and January of each year. The principal and interest are expressly stipulated to be paid on the face of the bonds themselves. There were also separate from the bonds, coupons for the interest—one for the interest on each bond for each half year. These coupons are separate, or separable by the holder, from the bonds, and show, each of them, how much interest is due, and the particular time at which it is due according to the tenor of the bond to which it relates. Each bond is payable to bearer, and each coupon for the interest on it is also payable to bearer.

These bonds and coupons were by plaintiff deposited with the auditor of the state of Louisiana. He was to hold them as security for the redemption and payment by plaintiff of certain bills issued by it. Whenever those bills or notes should be paid and cancelled, he was to return the bonds and coupons to plaintiff, and so *pro rata* when any part should be paid. This deposit was made under a law of the state under which plaintiff organized and obtained its corporate powers; and being a matter between the plaintiff and the bill-holders as parties in interest, it is much the same as if it had been done by compact between them.

Two hundred and fifty-two thousand dollars of the bills or notes of the bank, for which the bonds or coupons were pledged, have been paid and cancelled.

Those notes have been returned to the person with whom the bonds and coupons were deposited as auditor, and plaintiff has demanded and sought to obtain from him the bonds and coupons held as security for them, but has been and is wholly unable to recover them by legal process or otherwise. Moreover, the man with whom, as auditor, they were pledged (Mr. Peralta) has ceased to be an officer of this state, and has fled beyond the jurisdiction of the authorities thereof, and for all practical purposes, out of the state, taking the securities with him.

Both the man and securities are entirely beyond the reach of plaintiff and beyond all process of courts or of the government itself.

He is moreover an alien enemy of the United States, and he and the securities with him are within the lines of the enemy, in territory held by them *jure belli*, and therefore in law as well as in fact inaccessible to plaintiff, and incapable of being dealt with by it.

Money for the payment of the interest due has been deposited by the city, the debtor, with the defendant, "The First National Bank," the legal fiscal agent of the city, and is held by it for that purpose, and for that purpose alone. That interest the bank is willing to pay if the coupons are produced, but it refuses to pay it until they are produced, on the ground that it is authorized to pay only on the surrender of the coupons, and that the coupons being outstanding may hereafter appear in the hands of some one who can compel payment from one or the other of the defendants to him.

Plaintiff claims to recover the interest due; he claims to do this without producing the coupons, on the ground that they are placed beyond his power to produce by the unwarranted action of the recreant trustee, being detained by him wrongfully within the enemy's lines.

The claim is, that as plaintiff is the actual owner of the securities (bonds and coupons), it has a right to be paid what is due on them, and that as they were both in the hands of Mr. Peralta after the interest sought to be recovered, and the coupons for it had become due, and no one had any right to them then, no one can now have, or can hereafter acquire a title to them which will enable him to recover on them after payment made to plaintiff.

Of the matters discussed on the trial, many of them at very great length, these are all that are material to the case, in the view I have taken, and most of them were substantially conceded, and nearly all the rest are very easily deduced from the evidence.

On these facts one question arises: Are the coupons for the interest, which plaintiff claims to recover, shown to be so situated that no one hereafter to appear can have the right to them of a *bonâ fide* holder for value without notice? If they are, plaintiff must recover; if they are not, it is not so easy to say how he can recover.

If they are so situated, at any rate there is no difficulty in deciding that he may recover. The mere fact that they are in the territory of the enemy of the United States, with which no legal intercourse can be had, in the hands of an alien enemy there, is quite sufficient to warrant a recovery without the production of them in a proper case, and whether the holder is an auditor or not an auditor, or whatever he is, "*quocunque nomine gaudet*," and whether in law they may be deemed lost or not lost, it is

plain that they are within the familiar principle of law, applicable to securities lost or wrongfully withheld, and which authorizes a recovery without the production of them.

It is equally clear that if their *locus* there is shown, they are not lost within the rule of the Code—one of evidence merely—that before a recovery can be had on securities as lost, they must be advertised, &c. They are there, and they are beyond the power of the plaintiff, without his fault, and that is all that is necessary to warrant a recovery without the production of them in a case proper in other respects.

The bonds and not the coupons are the basis of the right to recover, the coupons being each a mere memorandum of the interest due from time to time on each bond, and of the time when such amonnt by the terms of the bond becomes due. The bonds are not intended to be surrendered when the interest is paid, but the coupons, if within the power of the owner, are ordinarily surrendered when the sums due on them are paid; and in this manner the coupons in the hands of the debtor become vouchers of the fact of payment, as they had previously, in the hands of the creditor, been evidence of the debt, and also that the amount stated was due, not to the holder of the bond (unless the same person held both bond and coupon), but to the holder of the coupon itself. In this manner they are made to answer probably three purposes; they make each separate half year's interest on each bond negotiable by itself, separately from the rest of the bond, and answer the purposes of evidence in the hands of the creditor and of the debtor in turn, as above stated, in the one evidence of debt and in the other evidence of payment.

The bonds claimed to the amount of $252,000 and the coupons attached, beyond all question, are the property of plaintiff, and are relieved from all right of possession in the present custodian, and so indeed, I think I may add, are all the rest of the half million in his hands.

He is a mere wrongdoer as to all, and has no right to any part of them; I think, even if he were in law and in fact the auditor of the state, it would make no difference. A fugitive from the state and the securities with him, he would have no right to retain them I think as against the bank, in his flight and away from his post of duty. It would be abundantly easier to hold that he might rightfully withhold them, a fugitive in the land of

the Dey of Algiers, that distinguished potentate being at peace with this country, than to hold that he had a right out of the territory held by this government, and within the territory of an enemy where no citizen of this country could have access, to retain them there.

But he is not auditor of the state in law or in fact, and would have no right to retain them anywhere—not even in the state, and at a proper place for an auditor to be at for the performance of his duties as such officer; and under the circumstances he surely has no right at all to hold them, or any of them.

But the question recurs, and it is the only one remaining to be considered: Are the coupons shown to be so situated that no one else can now have or hereafter acquire a title to them, which shall enable him to maintain an action on them? For it is not doubted that they are in their nature negotiable, like promissory notes, and a person who takes them before due for value, without notice of a defence in the hands of a previous holder, takes them discharged from all defences which might exist against them in the hands of any party through whom he derives title.

The plaintiff, in his petition, alleges that they (the coupons in question, at any rate to the amount of sixty thousand dollars), remained in the hands of Mr. Peralta until after the time at which they became due.

He says: "The coupons for the interest due on the 1st July, 1862, the 1st of January and the 1st of July, 1863, and the 1st of January, 1864, amounting to sixty thousand dollars, were in the possession of the auditor (Mr. Peralta), at Baton Rouge, after the same matured and became due."

The answer of the city takes issue on this, in a very general way, by denying in general terms the allegations of the petition not therein specially admitted. It suggests no alteration in their position, and, indeed, makes no allusion to this allegation of the petition at all, but is content with a general sweeping denial of all, not expressly admitted in the answer, more or less. This, however, is sufficient to change the burden of proof, and throws it on the plaintiff.

The answer of the city takes issue in a different manner, and denies pointedly and specifically whatever of the plaintiff's allegations it seeks to put at issue. After treating several other allegations of the petition, it answers to the allegation above stated,

in substance, that the coupons to the amount of $60,000 remained and were in possession of the auditor after they became due, not by denying that they were so, but by denying that they were in his hands at the time they became due "or are so now," that is, at the time the answer was made. It says: "It (meaning the city) denies that the coupons which matured on the 1st day of July 1862, or the 1st day of January 1863, or the 1st day of July 1863, or the 1st day of January 1864, or any other coupons, the property of the Union Bank, were in the possession of said auditor at the time of their maturity, or now are." This is not a denial that they have ever been so since they became due, and nothing less than that will put the very material averment of the plaintiff in that respect in issue.

The evidence in the case seems to sustain the allegation of the petition. Very slight evidence would be sufficient for the purpose in the existing condition of the case.

The First National Bank does in a formal manner deny it, and as to it evidence would be necessary if it were in a condition to make such an issue. But it is at least doubtful if the First National Bank has an interest that permits it to make such an issue. That institution, as the fiscal agent of the city, and the depository agreed on between the plaintiff, the owner of these securities, and the city the debtor, is but a trustee for the benefit of the city and the plaintiff, and the parties in interest being both parties to this suit, and bound by the judgment herein, it is at least doubtful, whether the bank, their trustee, should be heard to make an objection which neither of the parties in interest deigns to interpose. It is not material to the bank to whom it pays. In the disbursements of moneys belonging to the city it would perhaps incur no responsibility, except to the city, and the city being a party to this suit, will take care of its own interests and will be bound by the decision herein. It is not certain, however, and I will not assume that the bank would not, under any circumstances, be liable to the holders of the coupons in question, if any should be able to establish a right to recover on them. The bank will be protected beyond all doubt by the judgment herein as against the plaintiff and its co-defendant, the city of New Orleans.

How stands the case on the evidence?

First. They are shown to have been deposited, as above stated, with Mr. Peralta, then auditor, and there is no proof or allegation

that they have gone from his possession into that of any one else, and I am not aware that any presumption of such a change arises in the absence of proof and allegations to that effect. It is true that they should have gone from him to his successor in office, Mr. Torry, and, perhaps, that should be presumed in the absence of evidence; but that gentleman was called as a witness, and testified that they did not so come, and any such presumption is sufficiently negatived; and when it is recollected that the same Mr. Peralta still claims to be auditor of the state, and is exercising (although in his own wrong) the functions of that office at Shreveport or elsewhere, the omission to transfer to Mr. Torry, as his successor, the books, papers, and property of the office is accounted for, and the presumption that they still remain with him (Mr. Peralta) is not a little strengthened. Add to this the fact that he could not legally or without crime transfer or dispose of them to any one else, and that presumption becomes stronger still.

Moreover, this Mr. Peralta, although no officer, and having none of the rights of one, is nevertheless claiming to be so, and conducting himself as such; and although, as I have said, he has no right to these securities, and in withholding them is acting without warrant of law, still the fact is that he professes and attempts to play that character, and actually believes that he is doing so, and perhaps that he has the right so to do; and these securities in his hands are perhaps no more likely to be diverted by his criminal act to purposes wholly foreign to those for which they were deposited, or fraudulently sold or put in circulation in violation of duty, real or fancied, and of honesty and good morals, than they would be if he were actually and *de jure* auditor of the state, as he claims to be and to act, and as he no doubt is and has long been *de facto* of that large portion of the state held in occupation by the enemy; no more likely to be criminally converted to private purposes by him now than they were when held by the same person when he was (as all concede he was at one time) actual and *bonâ fide* auditor of the state *de jure* as well as *de facto*.

When the plaintiff applied to Mr. Peralta for these securities, by its agent, Mr. Gordon, Mr. Peralta claiming to act as auditor, received the cancelled notes and was about to deliver to him bonds to a corresponding amount, but was dissuaded from doing so, and

was finally overruled in his determination; and admitting that he still retained them, and that they belonged to plaintiff, and ought to go to him, yielded to adverse influence and refused to let plaintiff have them. He did not pretend that he did not still hold them, but on the contrary admitted the reverse, and wished to restore them to plaintiff by delivering them to Mr. Gordon.

But, aside from all evidence introduced as such at the trial, the conduct of this person, claiming to be auditor of this state under the rebel government in reference to these public securities, in the case of the plaintiff and those of several other public institutions similarly situated, has become almost matter of public or historical information, and we are all of us informed in the premises. And while with the strict non-intercourse maintained with the enemy, and all within his lines, by reason of the war, it is difficult to procure testimony from witnesses having personal knowledge on the subject, still intelligence on the subject, as reliable as can ordinarily be had in such a case, is possessed and by everybody fully relied on, that these securities are retained by the person claiming to be auditor, exactly as if he were really auditor, and by him kept out of circulation or use in any manner; and no one I believe doubts the fact. Mr. Peralta is in no just legal sense a public officer in our estimation, although he assumes to act as such, and is performing the role of auditor. If he were in law, as he and those associated with him claim he is—and we all know that he is *de facto*, as to a large part of the state, a public officer—auditor of public accounts, the evidence would seem different; but as it is, it seems to carry conviction to the minds of all. On the trial no real doubt seemed to be entertained by any one what in point of fact was the actual condition of these securities, and it was almost assumed. If the securities had gone out of the possession of Mr. Peralta into the hands of a *bonâ fide* holder, or in such manner that they were liable to get there before they became due, that fact would be vital to the defence and fatal to the plaintiff; and yet, if I recollect correctly, nothing of the kind was intimated; nothing of the kind was alleged in the proceedings or shown, or attempted to be shown in evidence, or claimed or suggested on the argument of the case. They were abundantly shown to have been placed there, and the evidence that they had not been removed or taken away was as good and convincing as proof of a negative often is.